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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

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No. 308260-III

IN THE COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

MAGDALENO GAMBOA and MARY J. GAMBOA,
Husband and wife,

Plaintiffs/Respondents,

v.

JOHN M. CLARK and DEBORAH C. CLARK,
Husband and wife,

Defendants/Appellants.

APPEAL FROM THE SUPERIOR COURT FOR YAKIMA COUNTY
THE HONORABLE RODNEY NELSON, JUDGE PRO TEMPORE,
PRESIDING

APPELLANTS' REPLY BRIEF

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III. ARGUMENT

A. The Gamboas continue to submit an incorrect brief.

The first sentence of page 1 of the subject brief reads as follows:

> The transcripts received by the undersigned on October 22, 2012 included three volumes entitled "Report of Proceedings", comprised of pages 1- 249, plus a separate transcript entitled "Verbatim Transcript of Proceedings Held on December 14, 2011 and March 22, 2012 comprised of pages 1-80.
> RB 1.

In fact, the three-volume Report of Proceedings is comprised of pages 1 through 289. The above error deletes the entirety of Volume III of the Report, which is comprised of pages 250-289.

One effect of the Gamboas' error is to introduce an element of ambiguity or confusion into these Appellant proceedings, because the error could potentially act to truncate off from further consideration very critical topics, such as the Judge's Oral Ruling (RP 280), his direction to "*work together to - - prepare the - - agreed findings*" (RP 287) and his utterance that, "*there wasn't really any dispute between the parties and everything seemed to work okay until about 2008*" (RP 281). The error could also introduce ambiguity or confusion into future proceedings, such as during the potential adjudication of allowable fees and expenses.

The error also raises questions within the Response. For example, the first sentence of page 2, "_ _ which the trial court found more credible RP 285; Ex 25 – pp2, 3)". Is this a valid citation, when the previous page of the Gamboa response states the Report of Proceedings ends at page 249?

The Gamboas have already received additional time from the Appellant Court Clerk to correct their original Respondents Brief. As noted above, they have failed to make all the corrections that were needed. The Clarks therefore request the Court of Appeals pursuant to RAP 10.7 to declare the Gamboas non-responsive to the Appellants Brief, and proceed accordingly.

B. The Clarks have preserved the issues for which they seek review.

The Gamboas argue that Mr. Clark failed to object to the trial court's findings of fact and conclusions of law, and thereby failed to preserve any claim of error with regard thereto. RB 11-12. Under CR 46, formal exceptions to the trial court's findings are not required. *See Petroleum Nav. Co. v. King County*, 1 Wash. 2d 489, 497, 96 P.2d 467 (1939). *See also*, 14A Washington Practice, Civil Procedure § 33.16. ("*The error in the finding, if any, is a matter of record in the case, and no exception is required to support an attack on it.*").

C. The trial court erred in awarding the Gamboas a prescriptive easement in the road on the Clarks' real property.

The Gamboas fail to support their argument in support of the trial court's Finding of Fact 4 with any citation to authority. RB 12-13. Respondent's argument should therefore not be considered. RAP 10.3 (a) (6); *Bercier v. Kiga*, 127 Wash. App. 809, 824, 103 P.3d 232 (2004).

In order to commence the running of the prescriptive period, it was incumbent upon the Gamboas to make a distinct, positive assertion of a right adverse to the property owner. *Kunkel v. Fisher*, 106 Wn. App. 599, 604 n. 14, 23 P. 3d 1128, *review denied,* 145 Wash.2d 1010 (2001) ; *Roediger v. Cullen*, 26 Wn. 2d 690, 706, 175 P. 2d 669 (1946); *Northwest Cities Gas Co. v. Western Fuel Co.,* 13 Wn. 2d 75, 84, 123 P. 2d 771 (1942). Here, however, in unchallenged Finding of Fact 8, the trial court found that "[*t*]*he Gamboas and the Clarks both used the roadway as described above without any disputes until 2008. Each party was aware of the other's use of the roadway, but neither objected to the other's use until a dispute arose in 2008.*" CP 214. Since they made no positive assertion of their claim to use the road, it follows that the Gamboas' prescriptive use, if any, of the road did not commence until 2008.

The Gamboas use of the road prior to 2008 was permissive, as the law presumes such use to be with permission of the owner of the servient

estate. *Kunkel v.* Fisher, 106 Wn. App. 603; *Roediger v. Cullen*, 26 Wn. 2d 706; The Gamboas' use of the road did not become adverse merely with the passage of time. *Ormiston v. Boast*, 68 Wn. 2d 548, 551, 413 P. 2d 969 (1966).

The Gamboas' citations to the record fail to establish an assertion of their claim prior to 2008. Nothing at RP 21-26, 33-38, 43-44, 49, 86-87 or 96 contains evidence of the required positive assertion of their claim. RB 13. The trial court's finding of continuous use of the road in Finding 4 is therefore not supported by substantial evidence, and must be reversed. *Green v. Hooper*, 149 Wn. App. 627, 641, 205 P. 3d 134 (2009).

The Gamboas fail to support their argument regarding Findings of Fact 5 and 6 with citation to authority. RB 13. Respondent's argument should therefore not be considered. RAP 10.3 (a) (6); *Bercier v. Kiga*, 127 Wn. App. 824. The Gamboas give no response to the Clarks' argument that the Gamboas' good faith belief that the owned the land upon which the road was situated is irrelevant under *Dunbar v. Heinrich*, 95 Wn. 2d 20, 27, 622 P. 2d 812 (1980). *See also, Imrie v. Kelley*, 160 Wn. App. 1, 11, 250 P. 3d 1045, *rev. den.,* 171 Wn. 2d 1029 (2011). The trial court thereby erred in Findings 5 and 6 by relying upon the Gamboas' subjective belief.

In the last sentence of Finding of Fact 5, the trial court also found that the doors of the Gamboas' shop could only be accessed by vehicles from the disputed roadway. CP 213. But at trial, Mr. Gamboa was asked the following question:

> Q...[I]s is possible to get your vehicle into
> that door by coming from either underneath
> or up behind and around?
> A Yes, it's possible.
> RP I p. 81.

The last sentence of Finding 5 is therefore not supported by substantial evidence, and must be reversed. *Green v. Hooper*, 149 Wn. App. 641.

The Gamboas also fail to address the Clarks' argument that Finding 6's finding that the Gamboas bladed the road and on one occasion applied gravel to the road is insufficient by itself to support the trial court's Conclusions of Law 2, 3, 4, 5, 7, or 8. RB 13. The Gamboas give no response to *Imrie v. Kelley,* or *Kunkel v. Fisher* on this issue. Finding 6 should therefore be reversed.

The Gamboas argue that the first sentence of Finding 15, even if erroneous, constitutes harmless error. RB 25. Once again, the Gamboas fail to support their argument with any citation to authority, so it should not be considered. RAP 10.3 (a) (6); *Bercier v. Kiga*, 127 Wn. App. 824. In Finding 15, the trial court placed upon the Clarks the burden of proving

that the Gamboas use of the road was permissive; "*A claimant's uses is adverse unless the property owner can show that the use was permissive.*" CP 216. Far from being harmless error, in the first sentence of Finding 15, the trial court erred by placing the burden of proving permissive use upon the Clarks. *See Northwest Cities,* 13 Wn. 2d 84 ("*The burden of proving a prescriptive right rests upon the one who is to be benefited by the establishment of such right.*"). Moreover, the first sentence of Finding 15 runs contrary to the rule that entry onto the land of another is presumed to be permissive. *Kunkel v. Fisher,* 106 Wn. App. 603.

The Gamboas defend the second sentence of Finding 15 by relying upon comments by Mr. Clark in his letter of December 3, 2008 to Mr. Gamboa. BR 14. The Gamboas nowhere address the Clarks' challenge to the trial court's finding of no implied permission in the second sentence of Finding 15. As set forth at page 36 of their opening brief, the record in this case compels a finding of implied permission to use the road. *See Imrie v. Kelley,* 160 Wn. App. 10, *Kunkel v. Fisher,* 106 Wn. App. 605; *Crites v. Koch,* 49 Wn. App. 171, 177-78, 741 P. 1d 1005 (1987) and *Miller v. Jarman,* 2 Wn. App. 994, 997, 471 P. 2d 704, *review denied*, 78 Wn. 2d 995 (1970). The second sentence of Finding of Fact 15 is therefore not supported by substantial evidence, and should therefore be reversed. *Green v. Hooper*, 149 Wn. App. 641.

The Clarks raised the issue of implied permission in their trial brief and in their response to the Gamboas' supplemental trial brief. CP 116; CP 142-144. In addition, the trial court addressed implied permission in Finding 15. CP 216. The issue of implied permission was therefore tried with the implied consent of the parties. *Bernsen v. Big Bend Elec. Co. Op., Inc.,* 68 Wn. App. 427, 434, 842 P 2d 1047 (1993).

The Gamboas erroneously assert that by arguing that Gamboas' use of the road was presumptively permissive, the Clarks have thereby invoked the "*vacant lands doctrine*". RB at 22-23, 26-27. The Clarks have done no such thing. The Gamboas fail to identify where in the record the Clarks invoked the vacant lands doctrine. By failing to cite to the record, the Gamboas argument should be disregarded. RAP 10.3(a) (6). The presumption of permissive use upon entry recognized in *Peoples Savings Bank v. Bufford*, 90 Wash. 204, 207, 155 P. 1068 (1916), is not confined to cases involving vacant lands, as evidenced by *Kunkel v. Fisher.* More recently, this Court, citing *Kunkel*, stated that "[*w*]*e start with the presumption that the use of another's property is permissive*." *810 Properties v. Jump,* 141 Wn. App. 688, 700, 170 P. 3d 1209 (2007). Neither *Bufford* nor *Kunkel* nor *810 Properties* involved vacant lands.

The Gamboas misplace reliance upon *Drake v. Smersh*, 122 Wn. App. 147, 89 P. 3d 726 (2004). RB 18-19. In Drake, 122 Wash. App.

147, unlike the case at bar, there was no evidence that the plaintiff's use of the road was permitted by neighborly sufferance or acquiescence. Here, in contrast, the record is replete with evidence that the Gamboas' use of the road was the result of neighborly accommodation by the Clarks. *See Appellant's Opening Brief*, p. 36. In *Drake*, the plaintiff's predecessor used a bulldozer to construct a driveway from his house to the road on the defendants' property. The Gamboas did not construct such a driveway to gain access to the road on the Clarks' property. In *Drake*, the record did not show any relationship between the parties' predecessors to support an inference of permissive use. Here, in contrast, the parties maintained a friendly relationship for years prior to 2008. Thus, the facts in *Drake* do not remotely resemble the facts of this case.

Drake addressed whether a presumption of permission arises from use. The court in *Drake* was not called upon, nor did it address, whether a presumption of permission arises from entry onto the land of another. In *Peoples Savings Bank v. Bufford*, 90 Wash. 204, 206-07, 155 P. 1068 (1916), the court recognized that a presumption of permission may arise from entry onto the land of another. Under *Peoples Savings Bank v. Bufford*, the Gamboas' entry onto the road for the first time in 1992 triggered a presumption of permission that did not change, if at all, until 2008.

The Gamboas recognize the change made to the presumption of adverse use tha was made by the decision in *Cuillier v. Coffin*, 57 Wn. 2d 624, 358 P. 2d 958 (1961). RB 23. The Gamboas, however, seek to avoid *Cuillier's* presumption of permissive use arising from the use of a road built by another by arguing that there was a dispute as to who was the owner of the roadway until 2009. RB 24-25. The Gamboas argument is contrived, as there was no dispute over who owned the road until receipt of the Gamboas' letter of Oct 29, 2008. EX 24. In unchallenged Finding No. 8, the court explicitly stated the "*dispute arose in late 2008*" CP 214. The Gamboas provide no authority that such a dispute entitles them to a result different than in *Cuillier.* The Gamboas' argument should therefore not be considered. RAP 10.3 (a) (6); *Bercier v. Kiga*, 127 Wn. App. 824.

The Gamboas also fail to recognize that in *Cuillier*, the court held that a claimant's use of a road built or maintained by the owner gives rise to a presumption of permissive use. *See Cuillier*, 57 Wn. 2d 627-28 (*Quoting* 170 ALR 825).

The Gamboas fail to support their argument regarding Finding 16 with a single citation to authority. RB 15-16. Further, the Gamboas fail to support their argument that the Clarks should not be allowed to claim error in the findings on which they helped. RB 16. The Gamboas' arguments should therefore not be considered. RAP 10.3 (a) (6); *Bercier v. Kiga*, 127

Wn. App. 824. The trial court erred in Finding of Fact 16 by awarding the Gamboas more of the Clarks' land than the Gamboas had acquired by prescription. *Northwest Cities Gas Co.,* 13 Wn. 2d 92 ("*[A]n easement acquired by prescription cannot be extended except by an adverse user which has been acquiesced in for the requisite length of time.*").

Decisions in adverse possession cases allow a court to extend a line of adverse use based upon the nature of the land and the character of the adverse use. *See, e.g., Frolund v. Franklin*, 71 Wn. 2d 812, 819-20, 431 P. 2d 188 (1967). Those decisions are inapposite to a prescriptive easement case, as the doctrine of prescriptive easements is a disfavored doctrine, since prescriptive easements necessarily work corresponding losses or forfeitures of rights of other persons. *Roediger v. Cullen*, 22 Wn. 2d 487, 494-95, 156 P. 2d 667 (1945).

The Gamboas' efforts to distinguish *Kunkel* are unavailing. RB 19-20. The Gamboas' efforts to maintain the road remain unimpressive. The trial court afforded very little weight to the Gamboas' singular instance of applying gravel to the road. RP IV 11-12. Similarly, in both *Kunkel* and *Imrie*, the adverse claimant's act of spreading gravel on the road on one occasion was held to be insufficient to establish a prescriptive easement. *See Kunkel,* 106 Wn. App. 605. *See also, Imrie*, 160 Wn. App. 10. A similar conclusion is warranted here.

As regards other efforts at maintaining, the record discloses that the parties each did other maintenance on the road. RP I p. 87; RP II p.241, 243. Mr. Clark testified that if he had seen Mr. Gamboa grading the road, he would have regarded it as a neighborly gesture. RP II p. 170. The record regarding maintenance therefore does not support a result different from that in *Kunkel* or *Imrie.*

The Gamboas attempt to distinguish cases such as *Kunkel* and *Imrie* on the fact that they used the road as the driveway to their house. RB 21-22. The Gamboas fail to support their argument with citation to authority, so it should not be considered. RAP 10.3 (a) (6); *Bercier v. Kiga*, 127 Wn. App. 824. The Gamboas' use of the road was unquestionably with the knowledge of the Clarks. Reciprocal use of such a road by a nonowner to gain access to his residence, with the knowledge of the owner of the land, supports an inference of permissive use. *Miller v. Jarman*, 2 Wn. App. 994, 997-98, 471 P. 2d 704, *review denied*, 78 Wn. 2d 995 (1970.

The Gamboas' discussion of the trial court's Conclusions of Law 2, 3, 4, 5, 7, 8 is once again devoid of any citation to authority. RB 25-26. Gamboas' argument should therefore not be considered. RAP 10.3 (a) (6); *Bercier v. Kiga*, 127 Wn. App. 824.

The Gamboas offer their good faith belief that they owned the road to explain why he treated the road as a true owner would. RB 28. The Gamboas again fail to support their argument with citation to authority. The Gamboas' argument should therefore not be considered. RAP 10.3 (a) (6); *Bercier v. Kiga*, 127 Wn. App. 824. The Gamboas' attempt to employ a subjective standard such as good faith cannot be reconciled with *Dunbar v. Heinrich*, 95 Wn. 2d 27-28 or *Imrie v. Kelley*, 160 Wn. App. 11.

The Gamboas argue that the trial court properly considered their shop/garage as part of the "*close*", despite the fact that it had not been constructed until 1999-2001. RB 28. The Gamboas therefore argue that the trial court did not err in entering Conclusions of Law 2 and 3. *Id.* The Gamboas again fail to support their argument with citation to authority. The Gamboas' argument should therefore not be considered. RAP 10.3 (a) (6); *Bercier v. Kiga*, 127 Wn. App. 824.

The Gamboas filed their action in 2009, less than 10 years after their garage/shop was constructed. CP 1. The Gamboas thereby failed to meet the requirement of continuous adverse use for 10 years with regard to the Gamboas' shop/garage. *Roediger v. Cullen*, 26 Wn. 2d 701-02.

Further, because the Gamboas failed to make a distinct, positive assertion of a right adverse to the Clarks until 2008, their use of the road did not become adverse until that time. *Kunkel v. Fisher*, 106 Wn. App.

604 n. 14; *Roediger v. Cullen*, 26 Wn. 2d 706; *Northwest Cities Gas Co. v. Western Fuel Co.,* 13 Wn. 2d 84. Instead, the mutual use of a road by the Gamboas and the Clarks supports an inference of permissive use, as it is assumed the owner is permitting his or her neighbor to use the road as a neighborly accommodation. *Cuillier v. Coffin*, 57 Wn. 2d 627; *Imrie v. Kelley*, 160 Wn. App. 9-10. The Gamboas' use of the road was permitted by the Clarks as a matter of neighborly sufferance or accommodation. *Imrie v. Kelley*, 160 Wn. App. 7; *Kunkel v. Fisher*, 106 Wn. App. 602 n. 7; *Crites v. Koch*, 49 Wn. App. 177; *Miller v. Jarman*, 2 Wn. App. 997. The trial court's Conclusions of Law 2 and 3 should therefore be reversed.

The Gamboas fail to support their argument regarding the trial court's Conclusion of Law No. 4 with any citation to authority. RB 28-29. The Gamboas' argument should therefore not be considered. RAP 10.3 (a) (6); *Bercier v. Kiga*, 127 Wn. App. 824. The Gamboas have no primary right to use the roadway, as they failed to establish that their use of the roadway was continuous for 10 years. *Roediger v. Cullen*, 26 Wn. 2d 701-02. The Gamboas also failed to establish that their use of the roadway was adverse, and not permissive. *Imrie v. Kelley*, 160 Wn. App. 7; *Kunkel v. Fisher*, 106 Wn. App. 602 n. 7; *Crites v. Koch*, 49 Wn. App. 171, 178, 741 P. 2d 1005 (1987). The trial court's Conclusion of Law 4 should therefore be reversed.

The Gamboas fail to support their argument regarding the trial court's Conclusion of Law No. 5 with any citation to authority. RB 29-30. The Gamboas' argument should therefore not be considered. RAP 10.3 (a) (6); *Bercier v. Kiga*, 127 Wn. App. 824. The trial court erred in Conclusion of Law 5 by awarding the Gamboas more of the Clarks' land than the Gamboas had acquired by prescription. *Northwest Cities Gas Co.,* 13 Wn. 2d 92.

The Gamboas fail to support their argument regarding the trial court's Conclusion of Law No. 8 with any citation to authority. RB 30. The Gamboas' argument should therefore not be considered. RAP 10.3 (a) (6); *Bercier v. Kiga*, 127 Wn. App. 824. The trial court erred in concluding that the Gamboas were entitled to judgment, as the Gamboas failed to establish continuous use for 10 years. *Roediger v. Cullen*, 26 Wn. 2d 701-02. The Gamboas also failed to establish that their use of the road was adverse, and not permissive. *Imrie v. Kelley*, 160 Wn. App. 7; *Kunkel v. Fisher*, 106 Wn. App. 602 n. 7; *Crites v. Koch*, 49 Wn. App. 178; *Miller v. Jarman*, 2 Wn. App. 997. The trial court also erred by awarding the Gamboas more of the Clarks' land than the Gamboas had acquired by prescription. *Northwest Cities Gas Co.,* 13 Wn. 2d 92. For the same reasons, the trial court also erred in entering awarding the Gamboas their statutory costs.

The Gamboas argue that the trial court did not err in entering judgment for them. RB 30. The Gamboas fail to support their argument with any citation to authority, so their argument should not be considered. RAP 10.3 (a) (6); *Bercier v. Kiga*, 127 Wn. App. 824. The trial court erred in concluding that the Gamboas were entitled to judgment, as the Gamboas failed to establish continuous use for 10 years. *Roediger v. Cullen*, 26 Wn. 2d 701-02. The Gamboas also failed to establish that their use of the road was adverse, and not permissive. *Imrie v. Kelley*, 160 Wn. App. 7; *Kunkel v. Fisher*, 106 Wn. App. 602 n. 7; *Crites v. Koch*, 49 Wn. App. 178; *Miller v. Jarman*, 2 Wn. App. 997. The trial court also erred by awarding the Gamboas more of the Clarks' land than the Gamboas had acquired by prescription. *Northwest Cities Gas Co.,* 13 Wn. 2d 92. For the same reasons, the trial court also erred in entering awarding the Gamboas their statutory costs.

The Gamboas argue that the trial court did not err in awarding attorney fees or costs of $410.00 for aerial photos. RB 30. The Gamboas fail to support their argument with any citation to authority, so their argument should not be considered. RAP 10.3 (a) (6); *Bercier v. Kiga*, 127 Wn. App. 824. The trial court erred in awarding the Gamboas attorney fees, as the Gamboas failed to establish continuous use for 10 years. *Roediger v. Cullen*, 26 Wn. 2d 701-02. The Gamboas also failed to

establish that their use of the road was adverse, and not permissive. *Imrie v. Kelley*, 160 Wn. App. 7; *Kunkel v. Fisher*, 106 Wn. App. 602 n. 7; *Crites v. Koch*, 49 Wn. App. 178; *Miller v. Jarman*, 2 Wn. App. 997. The award of $410.00 for aerial photos is not authorized, as photocopying costs are not awardable costs under RCW 4.84.010. *Estep v. Hamilton*, 148 Wn. App. 246, 263, 201 P. 3d 331 (2009); *Marriage of Van Camp*. 82 Wn. App. 339, 343, 918 P. 2d 509 (1996).

D. The trial court erred in denying the Clarks' request for relief under RCW CH. 7.48.

The Gamboas argue that RCW 7.48.315 is inapplicable, as their Amended Complaint alleges neither a nuisance nor a violation of specific laws, rules or ordinances. RB 31-32. In Paragraph 8 of their First Amended complaints, the Gamboas alleged, *inter alia*, that "*Defendants have also continued to deliberately overspray Plaintiffs' gravel driveway with their irrigation water, and have threatened to install another row of grapes to the west of current west-most row, eliminating approximately one-half of Plaintiffs' gravel driveway in the process*." CP 25. The Gamboas also testified that when they drove their vehicles, they would be hit by water from the Clarks' sprinklers. RP I p. 76. The Gamboas also complained that water from the Clarks' sprinklers would flood the road. RP I p. 76-77; EX 46. The Clarks' operation of their irrigation sprinklers

is an "*agricultural activity*" under RCW 7.48.310 (1). The Clarks' property is a "*farm*" under RCW 7.48.310 (2). Mr. Clark is a licensed farmer. EX 32, 34.

The Clarks also engaged in an "*agricultural activity*" under RCW 7.48.310 (1), by acting to prevent trespass, when Mr. Clark sent his September 25, 2008 letter to Gamboas concerning the trespassing of their dogs (EX 23); Clark's letter of Mar 26, 2009, offering to rent the disputed road to the Gamboas (Ex 29); and, when the Gamboas' declined Clarks' offer, Clark's letter of July 15, 2009, notifying Gamboas that any use by them thereafter would be an act of trespass (EX 37).

The Gamboas' allegations that the Clarks' irrigation water hit their cars and flooded the road involve a nuisance under RCW 7.48.010: "... [*W*]*hatever is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance and the subject of an action for damages and other and further relief.*"
By seeking to enjoin the Clarks' overspray of their alleged driveway with irrigation water, the Gamboas were seeking to abate an alleged nuisance, whether they choose to admit it or not. *See* RP 03/2/2012 p. 54: 16-23.

The trial court heard no testimony and was presented no evidence that the errant sprinkler water was deposited on real estate <u>actually owned</u>

by the Gamboas. The errant sprinkler water ultimately landed on only the Clarks' farm road or the corridor between the sprinklers and the Gamboa property line, and the road fulfilled its purpose of acting as a buffer zone to keep the Clarks irrigation water on their property. The trial court took note of this with the following: "*I'm going to take judicial notice that even if you got a sprinkler that does that, no matter what you do, there's probably going to be some water that goes onto this road and, you know, my ruling here is that Mr. Clark does have the right to farm that land and use the roadway to the extent necessary to farm that land and that if there was a little bit of water that gets on the roadway, that's going to be part of that.*" (RP 3-22-12, page 54, lines 19-23). It therefore follows that the Gamboas had no probable cause to seek an injunction to abate the perceived nuisance, in that the errant sprinkler water remained on the Clarks property.

The trial court denied the Gamboas' claim for an injunction against the Clarks' overspray. RP 03/22/2012 p. 54. The Clarks thus clearly prevailed on the Gamboas' claim that the Clarks' irrigation of their farm land constituted a nuisance.

Defendants argue, once again without citation to authority, that the use of "*may*" rather than "*shall*" in RCW Ch. 7.48 makes an award of costs and expenses to a prevailing farmer discretionary with the trial court.

RB 32. The Gamboas fail to support their argument with any citation to authority, so their argument should not be considered. RAP 10.3 (a) (6); *Bercier v. Kiga*, 127 Wn. App. 824.

The meaning of the word "*may*" in a statute may differ depending upon the context in which it is used. *National Association of Homebuilders v. The Defenders of Wildlife*, 551 U.S. 644, 692 n. 12, 127 S. Ct. 2518 (2007). RCW 7.48.315 (1) provides that any farmer who prevails in an action alleging nuisance "*may*" recover full costs and expenses. RCW 7.48.315 (2) provides that a farmer who prevails in an action (a) based on an allegation that agricultural activity on a farm is in violation of specified laws, rules, or ordinances, (b) where such activity is not found to be in violation of the specified laws, rules, or ordinances, and (c) actual damages are realized by the farm as a result of the action, claim, or counterclaim "*may*" recover full costs and expenses. RCW 7.48.315 (4) provides that in addition to recovering costs and expenses under RCW 7.48.315 (1) or (2), a farmer "*may*" recover exemplary damages if a court finds that the action, claim, or counterclaim was initiated maliciously and without probable cause. "*May*" is generally used in a statute to confer discretion. *See, e.g., Amren v. City of Kalama*, 131 Wn. 2d 25, 35 n. 8, 929 P. 2d 389 (1997). The use of the term "*may*" in RCW 7.48.315 (1), (2), (4) thus confers discretion upon the farmer, not the court.

Alternatively, "*may*" may be synonymous with "*shall*", if necessary to effectuate legislative intent. *See* Black's Law Dictionary (9th Ed. 2009) ("*In dozens of cases, courts have held* ***may*** *to be synonymous with* shall *or* must, *usu. in an effort to effectuate legislative intent.*"). "*May*" in RCW 7.48.315 (1), (2), (4) should therefore be construed as synonymous with "*shall*" in order to effectuate legislative intent to compensate farmers. "*Shall*" imposes a mandatory duty. *City of Wenatchee v. Owens*, 145 Wn. App. 196, 204, 185 P.3d 1218 (2008). The trial court was therefore required to award the Clarks their costs and expenses under RCW 7.48.315, including actual and exemplary damages.

The only reason given by the trial court for its denial of the Clarks' request for relief under RCW Ch. 7.48 was its erroneous conclusion that the Gamboas had prevailed on their claim for a prescriptive easement. *Ibid.* As indicated by the arguments and authorities in Paragraph B above, the trial court erred in that conclusion.

Therefore, in the event that the Court reverses the trial court's findings of fact and conclusions of law and judgment, the Clarks request the Court to award the Clarks damages and attorney fees and costs incurred in the trial court pursuant to RCW 7.48.315 (1), (2), (3), (4) or, in the alternative, to remand their claim for relief under RCW Ch. 7.48 to the trial court.

E. The Clarks request attorney fees and costs on appeal.

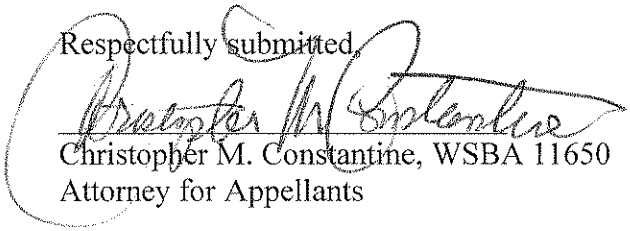
In the event that the Clarks prevail in this appeal, they request an award of attorney fees and costs under RCW 7.48.315 (1), (3) and RAP 18.1 and RAP 14.2.

IV. Conclusion.

The trial court's findings of a prescriptive easement are not supported by substantial evidence, and the findings do not support its conclusions of law. The trial court erredby failing to recognize that the Gamboas first entry on the road gave rise to a presumption of permissive use, by failing to recognize that the Gamboas' use of the road was permissive through the Clarks' neighborly accommodation, by concluding that the Gamboas had met their burden of proof by a preponderance of evidence, by shifting the burden of proof to the Clarks, by allowing "adverse" use, which may have only begun after 2008, to be applied retroactively, by not requiring "adverse" use to be continuous for 10 years after its inception, and by failing to recognize that the Gamboas' implied permissive use continued until at least 2008. The trial court erred in establishing a prescriptive easement in the road in favor of the Gamboas, and erred in including land owned by the Clarks outside the roadway. The Clarks therefore request the Court to reverse the trial court's findings of fact, conclusions of law and judgment as challenged above. Because the

Gamboas prevailed on their prescriptive easement claim only through judicial error, the trial court therefore erred in denying the Clarks' request for damages and attorney fees under RCW 7.48.315 (1), (2), (3), (4). The Clarks therefore request this Court to award them their damages under that statute, or, in the alternative, to remand the case to the trial court for hearing on the Clarks' claim. In the event that they prevail on appeal, the Clarks request an award of attorney fees and costs under RCW 7.48.315 (1), (3), and RAP 18.1 and RAP 14.2.

Respectfully submitted,



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V. Certificate of Mailing

The undersigned does hereby certify that on January 23, 2013, he served a copy of the Appellants' Reply Brief upon Respondents, by depositing the same in the United States mail, first class postage prepaid, addressed to the following:

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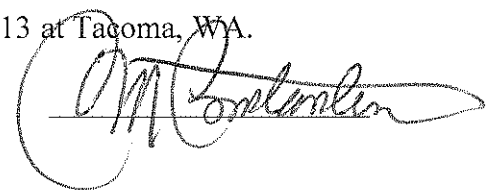
Dated this 23rd day of January, 2013 at Tacoma, WA.